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No. 09-821

In The Supreme Court of the United States

CHARLES E. SISNEY, *Petitioner,*

v.

TIM REISCH, ET AL., *Respondents,*

AND

UNITED STATES OF AMERICA, *Intervener.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER TO THE BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONER 1

I. Procedural Background 1

II. This Case Presents An Appropriate Vehicle For Certiorari And Warrants Independent Review 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

Cardinal v. Metrish,
No. 09-109 ..... *passim*
Holley v. California Dep't of Corr.,
599 F.3d 1108 (9th Cir. 2010) 5, 6
Sisney v. Reisch,
No. 09-821 ..... *passim*
Sossamon v. Texas,
No. 08-1438 ..... 1, 2
Van Wyhe v. Reisch,
581 F.3d 639 (8th Cir. 2009) 3

STATUTES

PLRA, 42 U.S.C. § 1997e(e) 4
RLUIPA, 42 U.S.C. §§ 2000cc to 2000cc-5 ..... *passim*
CRREA, 42 U.S.C. § 2000d-7 ..... *passim*

REPLY BRIEF FOR THE PETITIONER

I. Procedural Background

The petitions in *Sossamon v. Texas*, No. 08-1438, *Cardinal v. Metrish*, No. 09-109 and *Sisney v. Reisch*, No. 09-821 each raise the question whether the Eleventh Amendment bars private suits for money damages by prisoners against state officials for violations of Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5. The petition in *Sisney v. Reisch* raises the additional question whether the express prohibition against discrimination by federal funding recipients in the Civil Rights Remedies Equalization Act of 1986 ("CRREA"), 42 U.S.C. § 2000d-7, effectuates a waiver, either alone or in combination with RLUIPA, of the States' Eleventh Amendment immunity. Pet. at i-ii, 32-39; Pet. App. 23a-30a, 70a-76a.

On November 2, 2009, the Solicitor General was invited to file invitation briefs expressing the views of the United States on the questions presented in *Sossamon* and *Cardinal*.

On January 8, 2010, the petition in *Sisney* was filed. The Solicitor General sought and obtained two extensions of time until April 12, 2010, to file a response on behalf of the United States.[1]

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[1] The United States intervened in the proceedings before the district court and the court of appeals to defend the constitutionality of RLUIPA, and it is a party in intervention in this Court.

On March 18, 2010, the Solicitor General filed her invitation briefs recommending that the petition for a writ of certiorari should be granted in *Cardinal*, and that *Sossamon* should be held pending disposition of *Cardinal*. *Amicus Curiae* Brief for the United States in *Cardinal v. Metrish* at 6. The Solicitor General recommended that certiorari is warranted to resolve the split among the circuit courts on the question whether RLUIPA contemplates private suits for money damages and, if so, whether such suits are barred by the Eleventh Amendment. *Id.* at 14-21. The Solicitor General also recommended that certiorari is warranted on the basis that CRREA independently effectuates an express waiver of Eleventh Amendment immunity by recipients of federal funds. *Id.* at 8-13.

On April 12, 2010, the Solicitor General filed her response in the instant case recommending that the petition in *Sisney* should be held pending this Court's resolution of the petition in *Cardinal*.

II. This Case Presents An Appropriate Vehicle For Certiorari And Warrants Independent Review.

The Solicitor General agrees that certiorari is warranted to determine whether an individual may sue a State or a state official in his or her official capacity for damages for a violation of RLUIPA. The Solicitor General recommends that certiorari is warranted not only to resolve the circuit split addressing whether RLUIPA itself effectuates a waiver of Eleventh Amendment immunity, but also to allow this Court to consider whether CRREA's express prohibition against discrimination by federal funding recipients

effectuates an independent statutory waiver of Eleventh Amendment immunity. *Amicus Curiae* Brief for the United States in *Cardinal* at 7-13. Indeed, the lead argument advanced by the Solicitor General in support of certiorari is that this Court need not even reach the question whether RLUIPA's private right of action authorizing "appropriate relief" is sufficiently clear to effectuate a knowing and voluntary waiver of immunity from suits for monetary damages because Congress effectuated a waiver of immunity from such suits through CRREA.

The Solicitor General has thus recommended that certiorari should be granted in *Cardinal* on the same grounds raised and argued by Petitioner in this case. The *Sisney* petition unambiguously raises the question whether CRREA effectuates a waiver of Eleventh Amendment immunity, as well as whether CRREA's waiver extends to Section 3 of RLUIPA or, instead, is limited to federal statutes that expressly prohibit "discrimination" on the basis of discriminatory intent. *Sisney* Pet. at i-ii, 32-39. These questions were squarely presented to and expressly decided by the district court and the Eighth Circuit Court of Appeals in comprehensive published opinions.[2] Pet. App. 23a-30a, 70a-76a. As in *Cardinal*, Petitioner here also seeks a writ of certiorari to resolve the split among the circuit courts of appeals on whether RLUIPA itself expressly waives Eleventh Amendment immunity. Pet. at 21-32.

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[2] The Eighth Circuit's opinion is reported at *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009).

As the Solicitor General acknowledges, the question whether CRREA, either independently or in conjunction with RLUIPA, is sufficiently clear to effectuate a knowing waiver of the States' Eleventh Amendment immunity from suit was never presented to or decided by the Sixth Circuit in *Cardinal*. *Id.* at 9-11, 11 n.6. Thus, in the event this Court finds that CRREA was not raised or preserved in *Cardinal*, the instant petition is an appropriate vehicle for this Court's consideration of that important question. Even if review is granted in *Cardinal*, an independent grant of certiorari is warranted in this case where CRREA was squarely briefed and decided below, and expressly presented by Petitioner to this Court for review.

The instant petition further asserts as a separate and distinct question presented whether this Court's precedents governing an express statutory waiver of the Federal Government's sovereign immunity apply with equal force to determine whether a state has knowingly waived its Eleventh Amendment immunity in the Spending Clause context. Pet. at ii, 22-23, 26-28, 32 n.9; Reply Brief for the Petitioner to the Brief of Respondents Tim Reisch. Petitioner has argued that notwithstanding the split among the circuits, the courts of appeals have critically erred in failing to recognize and enforce the analytic distinction between express statutory waivers of the Federal Government's sovereign immunity and voluntary waivers of Eleventh Amendment immunity through the States' acceptance of clearly conditioned federal funds.

The Solicitor General also relied on these grounds to assert error, and to recommend that the petition for

a writ of certiorari be granted in *Cardinal*. *Amicus Curiae* Brief at 18-19. On this issue, too, the instant case provides an appropriate vehicle for review, as this distinct issue was squarely presented by Petitioner for this Court's consideration as an independent question.

Nor does the record in this case involve the infirmities the Solicitor General notes in *Cardinal*. *Id.* at 6 n.4. The record in this case is well-developed and supported, with both the district court and the Eighth Circuit providing comprehensive published opinions analyzing in detail waiver under both RLUIPA and CRREA, and the current circuit court split. Pet. App. 23a-30a, 62a-76a. The merits of Petitioner's RLUIPA claims are established, as he adduced facts demonstrating substantial burden sufficient to withstand summary judgment. Pet. App. 34a.

While the circuit split is grounds for review, a grant of certiorari is additionally warranted to review the Eighth Circuit's erroneous adoption of the federal sovereign immunity standard to require an explicit textual reference to damages in the Eleventh Amendment context, and to consider waiver in light of CRREA. Since the instant petition was filed, the Ninth Circuit has expressly adopted the Eighth Circuit's construction of both RLUIPA and CRREA. *See Holley v. California Dep't of Corr.*, 599 F.3d 1108 (9th Cir. 2010). The Ninth Circuit followed the Eighth Circuit's holding that absent an unequivocal waiver of immunity in the statutory text that expressly extends to monetary damages, RLUIPA's "appropriate relief" language does not unambiguously extend to immunity from monetary claims. The Ninth Circuit expressly

rejected the contention that waivers of federal sovereign immunity should be treated differently than Eleventh Amendment waivers effectuated pursuant to the Spending Clause, and, in support, invoked the Eighth Circuit's reliance on this Court's federal sovereign immunity cases in analyzing waiver under RLUIPA. *Id.* at 1111-12 n.3.

The Ninth Circuit further adopted in its entirety the Eighth Circuit's analysis of waiver under CRREA, holding, as the court of appeals in this case did, that absent an express statutory reference to the term "discrimination" in Section 3, RLUIPA is not a statute that unambiguously prohibits discrimination within the meaning of CRREA and thus is insufficient to effectuate a waiver of immunity. *Id.* at 1113-14. The Eighth Circuit's erroneous construction and application of this Court's precedents, Eleventh Amendment immunity and CRREA has become entrenched and, absent correction by this Court, will likely be extended to foreclose relief for violations of other civil rights statutes enacted pursuant to the Spending Clause.

Finally, the Solicitor General suggests that review is more appropriate in *Cardinal* because Petitioner in this case does not appear to allege personal injury. Thus, the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e) would pose an independent bar to recovery of monetary damages unless the imposition of a substantial burden under RLUIPA constitutes a compensable mental or emotional injury under the PLRA. Brief of the United States at 8 n.7. The Solicitor General suggests that in order to avoid this "ancillary and difficult question" *Cardinal* is the

preferred vehicle. *Id.* However, the question of whether Petitioner suffered a "mental or emotional injury under the PLRA" is not at issue in this case. The district court noted the limitations imposed by the PLRA. Pet. App. 76a-78a. Petitioner did not challenge, and the Eighth Circuit did not address or resolve, whether the PLRA limits Petitioner's relief under RLUIPA to nominal damages. There is no difficult or ancillary question standing in the way of review here because the PLRA is not at issue.

Even so, whether Petitioner's recovery would be limited by the PLRA is wholly irrelevant to the questions presented, and does not in any way undermine the strength of the instant petition. Whether the language of RLUIPA, or RLUIPA and CRREA, is sufficient to manifest Congress' clear intent to condition the voluntary acceptance of federal funds on the States' waiver of immunity from suit is a question separate and distinct from any limitations on recovery the PLRA may impose. The Solicitor General's views notwithstanding, the PLRA does not undermine the strength of the petition in this case.

CONCLUSION

For the reasons above, Petitioner respectfully submits that the instant case is an appropriate vehicle, if not the preferred vehicle, for this Court to consider the question of waiver of Eleventh Amendment immunity under RLUIPA and CRREA, and that an independent grant of certiorari is warranted. Accordingly, this Court should not hold the instant petition pending *Cardinal*, but should grant the petition for a writ of certiorari.

Dated: May 3, 2010

Respectfully submitted,

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